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In general, it may be said that while the enormous authority on this subject seems in accord, there is confusion in the reasoning of some of the courts and in especial the guiding principle, that these suits are in reality the corporation's suits, is not always kept clear in mind.

RIGHTS AND LIABILITIES OF A CITY ARISING FROM THE DIVERSION OF NAVIGABLE STREAMS.—The question of a city's right to divert water from a navigable stream is in some confusion, due to a failure of the courts to observe strictly the clear distinction between the law of navigable or public streams and the law of unnavigable or private streams. In the case of the former, added to the privileges of the individual riparian owner, a municipal corporation as such an owner derives further rights from the fact of its relation to the public welfare and from the powers inherent in bodies for public service on principles of eminent domain.

The rule concerning unnavigable or private streams is that every owner of land on such a watercourse is entitled to the enjoyment and use of the stream according to its natural flow, subject only to such interruptions as are necessary in its proper use by other owners.¹ But if an upper proprietor use an unusual amount of water or divert the stream, he will be liable to the lower riparian owner.² And the same rule applies to navigable or public streams so far as the riparian owners are private persons, as they must each exercise their rights thereto subject to the rights of other riparian proprietors and the public.³ A city or municipality, as a riparian proprietor, has no greater right in an unnavigable stream than an individual owner. Therefore, when the natural flow of a private stream has been diminished by a diversion of the water by a city for public use without due process of law and without having acquired a prescriptive right to divert the same, the riparian owners injured thereby may maintain an equitable action for an injunction and damages.⁴

But the bed and waters of navigable rivers belong to the state and are held in trust for the public.⁵ And any rights individuals may have in the stream are not permitted to interfere with the public use of the waters for navigation.⁶

¹ *Ware v. Allen*, 140 Mass. 513, 5 N. E. 629; *Dumont v. Kellogg*, 29 Mich. 420; *Red River Rolling Mills v. Wright*, 30 Minn. 249, 15 N. W. 167; *Carpenter v. Gold*, 88 Va. 551, 14 S. E. 329.

² *Ware v. Allen*, *supra*; *Carpenter v. Gold*, *supra*.

³ *Ockerhausen v. Tyson*, 71 Conn. 31, 40 Atl. 1041.

⁴ *Deisler v. City of Johnstown*, 24 N. Y. App. Div. 608, 48 N. Y. Supp. 683; *Sparks Mfg. Co. v. Town of Newton*, 57 N. J. Eq. 367, 41 Atl. 385; *Emporia v. Soden*, 25 Kan. 588, 37 Am. Rep. 265.

⁵ *State v. Korner* (Minn.), 148 N. W. 617; *Taylor v. Comm.*, 102 Va. 759, 47 S. E. 875, 102 Am. St. Rep. 865; *Sage v. New York*, 154 N. Y. 61, 47 N. E. 1096, 61 Am. St. Rep. 592, 38 L. R. A. 606. See 2 VA. L. REV. 220.

⁶ *Hart v. City of Albany*, 6 Wend. (N. Y.) 571. See Ang. on WATERS, 4th ed., § 555.

Furthermore, in the case of navigable streams, the right of public navigation is not the only right inherent in the public to which the rights of individual riparian owners are subservient. This is clearly illustrated by the recent case of *Loranger v. City of Flint* (Mich.), 152 N. W. 251, where the rights of a city as a riparian proprietor on a navigable stream were adjudicated. An action was brought against a city, which was diverting the water of a navigable river to supply its inhabitants with water for domestic and manufacturing purposes. The action was brought by an owner of a mill lower down on the stream who was injured thereby. The court came to the conclusion that the city had a right to take the water for the public without compensating the lower riparian proprietors for the injury caused them, and could not be enjoined from so doing. This decision seems in accord with reason and supported by other well considered cases.⁷

Since waters of navigable streams belong to the public, grants by a state or territory to corporations or private persons of the right to maintain dams across navigable streams for the purposes of obtaining power are in legal effect at all times subject to the paramount right of the state to divert a portion of the water for public uses.⁸ Such authority given by a state to persons authorizing them to erect dams are mere revocable licenses and not contracts, and therefore they have no right of action when the public takes the water and thereby injures them. The rights of riparian owners are subordinate to public uses of such water.⁹

This principle, besides being in harmony with sound principles of law, is strongly supported by public policy. To quote from Lockwood, J., "It is proper to consider the wants of man in regard to water. To quench thirst, and for household purposes water is absolutely indispensable, * * * but he could live if water were not employed in irrigating lands or propelling machinery."¹⁰ This proposition is further supported by the fact that the diversion of a navigable stream by the state for the purpose of a canal gives no right of action to the injured riparian owners.¹¹

⁷ *St. Anthony Falls Water Co. v. St. Paul Water Commissioners*, 168 U. S. 349; *City of Elgin v. Elgin Hydraulic Co.*, 85 Ill. App. 182; *Minneapolis Mill Co. v. Water Commissioners*, 56 Minn. 485, 58 N. W. 33, *affirmed* in 168 U. S. 349.

⁸ *Id.*

⁹ *St. Anthony Falls Water Co. v. St. Paul Water Commissioners*, *supra*; *City of Elgin v. Elgin Hydraulic Co.*, *supra*; *Minneapolis Mill Co. v. Water Commissioners*, *supra*; *contra*, *Smith v. Rochester*, 92 N. Y. 463, 44 Am. Rep. 393, holding that the state has no right to divert the waters of the small lakes and streams in New York, which are navigable but in which the tide does not ebb and flow, for any other purposes than for navigation except under the power of eminent domain on making just compensation.

¹⁰ *Evans v. Merriwether*, 3 Scan (Ill.) 492, 495, 38 Am. Dec. 106.

¹¹ *People v. Canal Appraisers*, 33 N. Y. 461; *Rundle v. Delaware and Raritan Canal Co.*, 14 How. 80.